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ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi, the 11th October, 1957

S.R.O. 3284.—Whereas the election of Shri Purnendu Sekhar Naskar as a member of the Lok Sabha from the Diamond Harbour Parliamentary constituency in the State of West Bengal, was called in question by an election petition presented under Part VI of the Representation of the People Act, 1951 (43 of 1951) by Shri Kamal Basu of 13/1A, Baloram Ghosh Street, Calcutta-4;

And whereas, the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of Section 86 of the said Act, for the trial of the said Election Petition has, in pursuance of the provisions contained in Section 103 of the said Act, sent a copy of its Order to the Election Commission;

Now, therefore, in pursuance of the provisions of Section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

DISTRICT—24-PARGANAS.

BEFORE THE ELECTION TRIBUNAL.

Present Shri B. Mukherji, M.A., LL.B. Additional District & Sessions Judge:

Saturday, the 3rd day of August 1957.

ELECTION PETITION No. 278 of 1957.

1. Sri Kamal Basu—*Petitioner.*

versus

1. Sri Purnendu Sekhar Naskar,

2. Sri Kansari Halder,

3. Sri Nalini Kanta Halder—*Respondents.*

This Election Petition coming on for final hearing on 27-7-57 in the presence of

1. Sri Snehanshu Kanta Acharyya Bar-at-Law,

2. Sri Hemanta Kumar Mitter Advocate,

3. Sri Kamalesh Banerjee Advocate,

4. Sri Tarak Nath Mitter Pleader—*for Petitioners.*

Vs.

1. Sri Binayak Nath Banerjee,

2. Sri Harendra Kishore Chatterjee,

3. Miss Aparna Bhattacharjee, Advocates—*for Respondents.*

and having stood for consideration to this day, the Court delivered the following judgements:—

The preliminary issue I have now been called upon to decide runs—Is the instant election petition liable to be dismissed by this Tribunal under sub-section

(3) of section 90 of the Representation of the People Act, 1951, on the ground that it does not comply with the provisions of section 82 of the Act?

2. It is necessary to recall in brief the facts which have led to this issue. By an election petition dated the 23rd April, 1957, under section 81 of the Representation of the People Act, 1951 (hereinafter referred to for brevity's sake, 'the Act') the petitioner Kamal Basu calls in question the election to Lok Sabha of the first respondent Purnendu Sekhar Naskar from the double member Diamond Harbour Parliamentary Constituency. In so far as it is material for decision of the preliminary issue, two reliefs sought by the petitioner in accordance with the provisions of section 84 of the Act bulk large here. They are—(i) "void the election of the first respondent Naskar" and (ii) "declare me duly elected." This two-fold relief attracts section 82(a) of the Act by virtue of which the petitioner shall join as respondents all the contesting candidates other than himself. An examination of the election petition reveals the names of three respondents—(i) Purnendu Sekhar Naskar, (ii) Kansari Halder and (iii) Nalini Kanta Halder. There is another name to be reckoned with: Sushil Kumar Sardar. He figures along with the petitioner and the three respondents in the list of contesting candidates in Form 7A published in the Gazette of India Extraordinary dated 16-2-57 at page 549/13 under section 38(1) of the Act read with Rule 11(5) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956 (hereinafter referred to, for brevity's sake, as 'the Rules'). The said Sushil Kumar Sardar, a contesting candidate, having not been joined as a respondent, section 82(a) of the Act is in breach. And section 82 having been in breach, this Tribunal under sub-section (3) of section 90 of the Act shall dismiss the instant election petition, notwithstanding the fact that the Election Commission has not done so under section 85 *ibid*.

3. On these facts the preliminary issue is grounded. The Chief Election Commissioner referred to this aspect in his order No. 2 dated 12th May, 1957 of Election Petition No. 244 of 1957, which is the same as Election Petition No. 278 of 1957 I am trying now—the former having been merged in a manner in the latter because of a technical consideration which calls for no notice here (*vide* order No. 4, dated 5th June, 1957 in Election Petition No. 244 of 1957). The parties having entered appearance before me on 19th July 1957, I heard their learned Advocates, raised the preliminary issue and set it down for hearing on 27th July 1957. The consideration which weighed with me was that should the present election petition not survive the preliminary issue, expending time and energy to determine the truth or falsity of the very various allegations traversed by the petitioner would be a labour in vain. On 27th July 1957, the learned Advocate for the first respondent Naskar, Sri Banerjee, addressed me "adopting" (as he said) the preliminary issue raised by me. The learned Counsel for the petitioner Kamal Basu, Sri Acharyya, addressed me too. After having heard Sri Banerjee in reply I took time to consider this interesting matter—a point of first impression as it seems—and reserved my order till today (3rd August 1957). I express my indebtedness to Sri Banerjee and Sri Acharyya for the help I have received from them.

4. The preliminary issue which is for decision naturally falls into two parties:—

I. Is Sushil Kumar Sardar a contesting candidate within the meaning of section 82(a) of the Act?

II. If he is, is his non-joinder fatal?

5. To the first part first. Leaving aside the earlier stages of nominations, scrutiny of nominations and the ultimate emergence of validly nominated candidates under section 38(8) of the Act—and Sri Banerjee has been good enough to take me through all these stages and beyond—let me come straight to the list of contesting candidates under section 39(1) referred to in the concluding portion of the second paragraph *ante* of this order. Indeed there can be no running away from the said Notification, dated 15th February 1957 published in the Extraordinary issue of the Gazette of India of the day following. Sushil Kumar Sardar is third in the list of contesting candidates in Form No. 7A.

6. Sri Acharyya, the learned Counsel for the petitioner, does not deny that much. But he contends that Sushil Kumar Sardar retired on 13th February 1957 (*vide* Gazette of India Extraordinary, dated 25th February 1957 at page 682), under section 55A of the Act and, therefore, ceased to be a contesting candidate. Developing his contention he refers to O.E.D. and submits that retirement means withdrawal and *vice-versa*. The lexicon of this Tribunal, however, is not O.E.D. but the Act. And according to that lexicon withdrawal under section 37 of the Act means one thing and retirement under section 55A means another. If, for

example, Sardar had withdrawn under section 37 of the Act, he would not have lent his name as a contesting candidate under section 39 *ibid.* And the point I have been called upon to decide now would not have arisen for consideration. So I find no substance in Sri Acharyya's contention.

7. Sri Acharyya then refers to the definitions of "candidate" in Rules 17(b) and 52(b) of the Rules. Couched in the same language in both the Rules, the definition runs—"Candidate" means a contesting candidate who has not retired in accordance with the provisions of section 55A. So these two Rules seem to favour the interpretation sought to be put by Sri Acharyya. But this favour appears to be ineffective. These definitions hold good, as rightly argued by Sri Banerjee, for the limited purpose of the Chapters where the two Rules occur. The opening words of Rule 17 in Chapter II of the Rules are: "In this Chapter, unless the context otherwise requires—" So this definition cannot be stretched to any other Chapter of the Rules, far less to any Part of the Act. By parity of reasoning the definition of "candidate" in Rule 52(b) in Chapter III of the Rules, where the opening words are the same, deserves like treatment too. Surely there is nothing in the context of these two Chapters which will enable this Tribunal to shift the definitions of "candidate" to Part VI of the Act where section 82 occurs.

8. This is not all. Part VI of the Act has an interpretation clause of its own embodied in section 70. This section defines *inter alia* "candidate" in clause (b) and "returned candidate" in clause (f) and steers clear of any definition of "contesting candidates". There must be a reason behind it. Sushil Kumar Sardar is a person who has been duly nominated at the election from the Diamond Harbour Constituency. So he satisfies the definition of "candidate" in section 79(b). Not only that; by the same definition he shall be deemed to have been a candidate from the time when, with election in prospect he began to hold himself out as a prospective candidate. And the definition of a "returned candidate" is very necessary, because that expression occurs in section 82(a) and does not occur in section 67 where the expression used is "elected candidates". So the meaning of the expression "returned candidate" is made clear beyond all controversy by the definition in section 79(f). There is no such necessity however, about the expression "contesting candidates", as it occurs in section 82(a). Because Parliament has provided with sufficient clarity in section 38(1) what the expression "contesting candidates" means. Sushil Kumar Sardar is such a contesting candidate. Had it been Parliament's intention that a "contesting candidate" under section 38(1) retiring under section 55A should not be deemed a "contesting candidate" within the meaning of section 82(a), a definition in suitable terms was only to be expected in the interpretation clause: section 79. Instead, one comes across sub-section (5) of section 55A to which Sri Banerjee invited the pointed attention of this Tribunal. It runs—

"(5) Any person who has given notice of retirement under sub-section (2) shall thereafter be deemed not to be a contesting candidate for the purposes of section 82."

So the implication appears to be too clear to be missed that a candidate who has retired is to be deemed a contesting candidate for all other purposes and for all other provisions including section 82(a). Indeed the intention of Parliament appears to be unmistakable. Section 52 provides for countermanding the poll if a contesting candidate die between the nomination and the poll. So in the very nature of things a contesting candidate retiring and dying thereafter cannot be the cause of the poll being countermanded. Hence sub-section (5) of section 55A makes it clear that for the purpose of countermanding only, a candidate who has given notice of retirement shall not be deemed a contesting candidate. For other purposes he is and continues to be a contesting candidate.

9. Sri Acharyya thereafter refers to the recent Madras Chief Minister's case as reported in the Statesman. Sri Banerjee objects to this Tribunal taking notice of such reports. In answer to Sri Banerjee's objection I only reproduce the following from S. C. Sarker's Law of Evidence, 9th Edition, at page 394:

"In a case Counsel relied on a judgment published only in the Statesman and Costello J. allowed the report of the judgment to be placed before him observing 'it has been said on high authority that the position of the Statesman is similar to that of the Times.' (Statesman, Calcutta, 18th February 1928)."

10. Overruling Sri Banerjee's objection therefore I have looked into the reports published in the Statesman kindly supplied by Sri Acharyya. One of the preliminary points taken in that election case is the point I am dealing with now. The one-man Election Tribunal, as it appears from the reports, dismissed that preliminary objection. But what are the reasons which led the Tribunal to do so does not appear from the report. So that can be of little help to

this Tribunal. That consideration apart, it appears from the Sunday Statesman dated June 30, 1957 where the report condescends to some details, that Counsel for the petitioner filed a petition for amendment of the original election petition. The amendment sought to delete the second prayer in the original petition that Mr. S. Jyarama Reddy, the rival candidate and the second respondent, be declared elected. No such prayer has been made by Sri Acharyya before this Tribunal. On the other hand, Sri Acharyya insists on keeping the petition as it is, leaving it to the Tribunal to delete the additional relief claimed by virtue of which the petitioner wants to be declared to have been duly elected. (More of which hereafter). Thus it is seen that the Madras Chief Minister's Case cannot help this Tribunal in any way. It goes without saying that the decision arrived at there is in no way binding on this Tribunal.

11. Sri Acharyya then refers to Sitaram Hirachand Birla's Case reported in A.I.R. 1953 Bombay 293 and invites the attention of this Tribunal to the observations made by his Lordship, Chagla C.J., at page 296 of the report. Under old section 82 a petitioner was to join as respondents to his petition all the candidates who were duly nominated at the election. His Lordship held *inter alia* that the words "at the election" emphasised the point of time when the election took place. Sri Acharyya therefore argues that who is or is not a contesting candidate has to be judged from the point of time when the election or the actual poll takes place. If that is done, no doubt Sushil Kumar Sardar cannot be called a contesting candidate at the time of the poll. As a matter of fact, he had retired some days earlier on 13.2.57. Sri Banerjee, however, points out that Sitaram Hirachand Birla's Case was viewed with disfavour by the Supreme Court in Bhikaji Keshao Joshi's Case: 1955 Supreme Court Appeals 999 at pages 1005-6. It appears from the judgment of the Supreme Court that their Lordships would prefer to base the decision not on any meticulous construction of the phrase "at the election" but on a comprehensive consideration of the relevant provisions of the Act and of the Rules framed thereunder and of the purposes, if any, of the requirement under section 82 as to the joinder of parties other than the returned candidate. Their Lordships, however, refrained from passing any final opinion on that issue since it was decided in the earlier case of Jagan Nath: 1954 Supreme Court Appeals 1111, that even if any of the necessary parties had not been impleaded, the petition was not to be dismissed *in limine* on that sole ground. So it is there only to be seen that Birla's case relied on by Sri Acharyya has been disapproved by the Supreme Court, though the observations which their Lordships were pleased to make were in the nature of *obiter dicta*. But even the *obiter dicta* of the Supreme Court are not to be disregarded. That apart, the language in the present section 82 is not the language which was there in the old section 82. But the words "at the election" do come in a manner even in the new section 82 if the word "candidate" as it occurs there be read with its definition in section 79(b). In other words, when section 79(b) and section 82(a) are read together, "contesting candidate" means a contesting person who has been or claims to have been duly nominated as a candidate at any election—here at the election from the Diamond Harbour Parliamentary Constituency. So the words "at the election" do come full circle back in the present section 82 as well. But it behoves me to take a comprehensive view of the provisions of this Act and of the Rules, as I have done, and to hold, which I do, for considerations referred to in paragraphs 5 to 8 *ante*, that Sushil Kumar Sardar is a contesting candidate for the purposes of section 82. If he had been joined, he would have had an opportunity of raising recriminations under section 97 of the Act. This indeed very much looks to be the purpose of the stringent provisions of section 82 made still more stringent by section 90(3) *ibid*.

12. There is still another consideration which seems to point to the same conclusion. Sections 38 and 82 are such that one goes with the other. Confining to old sections first, it is seen that section 38 prescribes publication of a list of valid nominations and section 82 enjoins that all candidates duly nominated at the election are to be joined as respondents. Turning to the present sections section 38(1) prescribes publication of a list of contesting candidates and section 82(a) enjoins that all the contesting candidates are to be joined as respondents when the two-fold relief which the petitioner Kamal Basu now seeks is claimed. The similarity appears to be striking. So this is one more reason for the finding I have arrived at: that contesting candidates referred to in section 82(a) of the Act are the contesting candidates a list of whom has been published under section 38(1) *ibid*. What I record in this paragraph is based on the contention of Sri Banerjee—a contention which I accept. Hence Sushil Kumar Sardar is a contesting candidate whom the petitioner Kamal Basu has not joined as a respondent at his peril. I find so.

13. Before I leave the first part of the preliminary issue, a minor point needs notice. Sri Banerjee sees something foul or suspicious in the contents of Annexure A to the affidavit in opposition sworn by the petitioner Kamal Basu. There he appears to be mistaken, if I may say so with respect. The strip of blank paper pasted over the entry containing the serial number and the name of Sushil Kumar Sardar after his retirement when the amended Form 7A was sent to the petitioner Kamal Basu, a contesting candidate, under Rule 16(2) of the Rules appears to be quite in accord with the executive instructions of the Election Commission to the Returning Officers on this point—"In all subsequent notices (after retirement) containing the list of contesting candidates his name (that is, the retiring candidate's name) should be omitted or scored out or, preferably, a strip of blank paper should be pasted over the entry containing his name. Do not make any consequential corrections in respect of the serial numbers of the other candidates, which will remain unchanged as before." And there is nothing wrong either in the dates in the forwarding letter over the signature of A. K. Majumdar—typed by A. Saha on 16.2.57 and issued by Sri Majumdar on 20.2.57—being anterior to the date of the Notification issued by the Election Commission: 22.2.57 and published in the Gazette of India Extraordinary dated 25.2.57. Once it is remembered that Sardar gave notice of his retirement on 13.2.57 and once it is understood that the official news of retirement travels from Allpore, the head-quarters station of the Returning Officer, to Delhi, the head-quarters station of the Election Commission, and not *vice-versa*, these dates far from rousing suspicion explain themselves and are as they should be. I shall go a little more and say that if the respondent Naskar had produced the notice of retirement received by him—it is said that it is missing—I have no doubt that the same strip of blank paper would have been found, and the same dates too.

14. Now to the second part of the preliminary issue. My finding so far is that Sushil Kumar Sardar is a contesting candidate whom it was incumbent upon the petitioner Kamal Basu to join as a respondent. In other words, section 82(a) of the Act has not been complied with. And the penalty for this non-compliance is provided for in sub-section (3) of section 90 of the Act: The Tribunal shall dismiss the petition.

15. Is there any way out for the petitioner Kamal Basu? I have tried to stretch in his favour but failed. I have tried, because to dismiss a petition of this magnitude *in limine* is something very serious. In Jagan Nath's case the then section 82 was in breach and the word "shall" was there. Still the petition could not fail *in limine*, because non-compliance thereof was not then made penal. The then section 90(4) did not include old section 82. What is more, the word used there in sub-section (4) of section 90 was "may"—and not "shall". The Amendment Act 27 of 1956 changed all that. Sub-section (3) of section 90, as it stands now, corresponds to old sub-section (4) of section 90. Breach of section 82 is included here and the word used is "shall". So non-compliance with the provisions of the present section 82 has been made penal. Therefore, as observed by the Supreme Court in Jagan Nath's Case, section 82 is mandatory, and not directory only. So is section 90(3). The Tribunal has little option.

16. Sri Acharyya will not pray for withdrawal of the additional relief by virtue of which the petitioner Kamal Basu wants to be declared elected. Supposing he had made such a prayer, what would have happened? No doubt, withdrawal of a relief is not withdrawal of the petition. Still withdrawal in the circumstances means amendment of the petition. I do possess powers for amendment under the Civil Procedure Code. But those powers are subject to the provisions of the Act, as sub-section (1) of section 90 prescribes. And one such provision is sub-section (3) of section 90 under which I am bound to dismiss an application if section 82 has not been complied with. So I am clear I could not have allowed the prayer for withdrawal, were such a prayer made. Equally clear am I that I have no power either to cancel *suo motu* the additional relief claimed and to proceed with the petition denuded of that relief.

17. The conclusion I have therefore come to, not without regret, is that non-joinder of Sushil Kumar Sardar is fatal. Not without regret—because of two reasons. First: but for this avoidable error on the part of the petitioner Kamal Basu it would have been possible for this Tribunal to enter into merits with a view to testing if the purity of the elections has remained unsullied. Second: though factually a candidate who has retired ceases to contest at the poll, not even being allotted a ballot box, legally he must be deemed a contesting candidate for the purposes of section 82(a). The position is indeed harsh. But law has made it so. And it is not for me to rise above the law.

18. In all the circumstances and upon the whole of the material I have had put before me, I dismiss the instant election petition *in limine*.

Costs will follow the event and I assess costs in a lump at Rs. 100.

B. MUKHERJI, Tribunal.
3rd August, 1957.

[No. 82/278/57-4134.]

By Order
A. KRISHNASWAMY AIYANGAR, Secy.